

STATE WATER CONTROL BOARD ENFORCEMENT ACTION

SPECIAL ORDER BY CONSENT WITH EAGLE HARBOR SHOPPING CENTER, L.L.C. Permit No. VAR450817

SECTION A: Purpose

This is a Consent Special Order issued under the authority of §62.1-44.15(8a) and §62.1-44.15(8d) of the Code of Virginia, between the State Water Control Board and Eagle Harbor Shopping Center, L.L.C. for the purpose of resolving certain violations of environmental law and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. “Code” means the Code of Virginia (1950), as amended.
2. “Board” means the State Water Control Board, a permanent citizens’ board of the Commonwealth of Virginia as described in the Code §§ 10.1-1184 and 62.1-44.7.
3. “Department” or “DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in the Code § 10.1-1183.
4. “Director” means the Director of the Department of Environmental Quality.
5. “Order” means this document, also known as a Consent Special Order.
6. “EHSC” means Eagle Harbor Shopping Center, L.L.C., certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
7. “TRO” means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
8. “VPDES Regulations” means 9 VAC 25-31-10 *et seq.* - Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation.
9. “VPDES General Permit Regulations” means 9 VAC 25-180-10 *et seq.* – Virginia Pollutant Discharge Elimination System General Permit Regulation for Discharges of Storm Water from Construction Activities.

10. "Permit," means General VPDES Permit No. VAR450817.

SECTION C: Findings of Fact and Conclusions of Law

1. On November 8, 2002, DEQ received a complete registration statement from EHSC for a VPDES storm water general permit associated with construction activity of a general commercial shopping area (a/k/a Eagle Harbor Shopping Center) located in Isle of Wight County, Virginia. Coverage under the Permit became effective November 18, 2002 and expires June 30, 2004.
2. The shopping center is located on Tract 9 of the Eagle Harbor residential/commercial development in Isle of Wight County, Virginia. The shopping center is approximately 14 acres and will include a strip mall and a Food Lion grocery store.
3. Section 62.1-44.5.A of the Code and §9 VAC 25-31-50.A. of the Regulations state: "Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances..."
4. Section 62.1-44.5.B of the Code and §9 VAC 25-31-50.B of the Regulations state any person/permittee "who discharges or causes or allows a discharge of...wastes...into or upon state waters, shall notify the Department of the discharge immediately upon discovery of the discharge, but in no case later than 24 hours after said discovery."
5. Part II.A of the Permit requires EHSC to develop a storm water pollution prevention plan (SWP3) prior to the submittal of a registration statement and to implement and provide for compliance with the terms and schedule of the plan beginning with the initiation of construction activities. EHSC's registration statement stated their Erosion and Sediment (E&S) Control Plan would serve as the SWP3. Under Part II of the Permit, the E&S Plan can serve as the SWP3 provided it meets or exceeds the SWP3 requirements of Part II.D of the Permit.
6. Section 9 VAC 25-180-70 of the VPDES General Permit Regulations and Part III.L of the Permit states: "The permittee shall comply with all conditions of this permit."
7. On December 13, 2002, DEQ compliance staff (Staff) observed unfiltered sediment-laden water being discharged into a roadside ditch adjacent to Route 17/258 from dewatering activities at the shopping center. EHSC's SWP3 and E&S Plan state: "Effluent from de-watering activities must be filtered or passed through an approved sediment-trapping device before being discharged from the site."
8. The VPDES General Permit Regulation, at 9 VAC 25-180-50.A, states that discharges from construction sites are authorized only upon the condition that the regulated party complies with the requirements of Section 9 VAC 25-180-70. (Part II of the Permit). Part II of the Permit requires that the permittee comply with the provisions of the SWP3. The unauthorized discharge referenced in paragraph 7 above was not reported to DEQ as required by Section 9 VAC 25-31-50.B.

9. On December 13 and 17, 2002, February 24 and 28, 2003, and March 6, 2003, Staff observed the site's storm water outfall, located near the intersection of Eagle Harbor Parkway and Route 17/258, discharging sediment-laden water into Ragged Island Creek and adjacent wetlands. The inspections revealed that the discharges occurred during a time that EHSC had failed to install and/or maintain proper E&S controls, as required by Part II of the Permit. These unauthorized discharges were not reported to DEQ. Significant erosion was noted surrounding the outfall and in the adjacent wetlands. DEQ observed during the February 28, 2003 and March 6, 2003 inspection that EHSC installed additional E&S controls; however, they were insufficient to control runoff due to significant rainfalls.
10. On December 17, 2002, Staff reviewed the E&S Control Plan for the site and found the following SWP3 components had not been implemented and/or included in the plan, rendering the E&S Control Plan deficient as a SWP3 (a complete SWP3 was developed and implemented by EHSC on January 30, 2003):
 - a. Part II.D.2a (1)(b) of the Permit requires EHSC to install and maintain erosion and sediment controls. On December 13 and 17, 2002, and February 24 and 28, 2003, Staff observed that E&S controls were not installed and/or maintained; and/or stockpiles were not correctly maintained, stabilized, and /or protected with sediment trapping devices; and/or storm water inlet and outlet protection was not implemented and maintained prior to and during construction activity.
 - b. Part II.D.2c (2) of the Permit requires EHSC to make provisions to minimize the transport of sediment by vehicular tracking onto paved surfaces. On December 13 and 17, 2002, Staff observed accumulations of sediment on Smith Neck Road and Eagle Harbor Parkway located near the construction entrances for EHSC. The construction entrances were not maintained in accordance with the E&S Control Plan.
 - c. Part II.D.4 of the Permit requires EHSC to inspect discharge locations to ascertain whether E&S control measures are effective in preventing significant impacts to receiving waters. Prior to February 24, 2003, EHSC failed to inspect the outfall location to ensure the effectiveness of E&S control measures.
 - d. Part II.E of the VPDES Permit requires that the SWP3 shall clearly identify for each measure identified in the SWP3, the contractor(s) and subcontractor(s) that will implement the measure. All contractors and subcontractors identified in the plan must sign a copy of the certification statement in Part II.E.2 of the VPDES Permit. The contractors and subcontractors must sign a copy of the certification statement before conducting any professional service at the site identified in the SWP3. Contractor and subcontractor certification statements were not completed and included in the SWP3 until February 28, 2003.
11. On February 3, 2003 and March 17, 2003, DEQ issued EHSC Notice of Violation No. W2003-01-T-0005 and W2003-03-T-0002, respectively, for the above mentioned violations.

12. EHSC maintains they promptly installed and maintained E&S controls at the shopping center.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in VA Code § 62.1-44.15(8a) and (8d), orders EHSC, and EHSC agrees, to:

1. Voluntarily pay a civil charge of \$9,200 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall include EHSC's Federal Identification Number and shall note on its face that the payment is being made in accordance with the requirements of this Order. Payment shall be made by check, certified check, money order, or cashier's check payable to the "Treasurer, Commonwealth of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240.

2. Comply with all the requirements of the Permit.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of EHSC, for good cause shown by EHSC, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notices of Violation issued to EHSC by DEQ on February 3, 2003 and March 17, 2003. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. For purposes of this Order and subsequent actions with respect to this Order, Eagle Harbor admits the jurisdictional allegations, but does not admit the factual findings, and conclusions of law contained herein.
4. EHSC consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. EHSC declares it has received fair and due process under the Administrative Process Act, Va. Code §§2.2 - 4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or

law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by EHSC to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. EHSC shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. EHSC shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. EHSC shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which EHSC intends to assert, will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto; their successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and EHSC. Notwithstanding the foregoing, EHSC agrees to be bound by any compliance date, which precedes the effective date of this Order.
11. This Order shall continue in effect until TPRC petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order. In addition, the Director or the Board may terminate this Order, for good cause upon 30 days' written notice to Eagle Harbor. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Eagle Harbor from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
12. By its signature below, EHSC voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of _____, 2003.

Francis L. Daniel, Tidewater Regional Office for
Robert G. Burnley, Director
Department of Environmental Quality

EHSC voluntarily agrees to the issuance of this Order.

By: _____

Date: _____

Commonwealth of Virginia

City/County of Isle of Wight, VA

The foregoing document was signed and acknowledged before me this ____ day of
_____, 2003, by _____, who is

_____ of EHSC, on behalf of the Corporation.

Notary Public

My commission expires: _____.